UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

LEONARD C. JEFFERSON	:	
	:	
v.	:	C.A. No. 16-016S
	:	
CORRECTIONAL OFFICER PEPIN, et al.	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

Pending before the Court pursuant to (28 U.S.C. § 636(b)(1)(B))[1] is Plaintiff Leonard Jefferson's Motion to Amend his Complaint. (Document No. 27). Defendants filed an Objection to the Motion. (Document No. 28). Upon review of the documents filed, I recommend that Plaintiff's Motion to Amend (Document No. 27) be DENIED.

Background

Plaintiff is an inmate at the Adult Correctional Institution ("ACI") in Cranston, Rhode Island. His fifty-page pro se Complaint, filed on January 19, 2016, alleged violations of 42 U.S.C. §1983, the First and Fourteenth Amendments to the United States Constitution and various Rhode Island state laws concerning "the tort of theft." These allegations stemmed from the confiscation of "contraband" from Plaintiff's cell, which consisted of carbon paper and various drawings Plaintiff composed that allegedly depict violence against law enforcement officers. Defendants filed a Motion to Dismiss the Complaint on May 12, 2016. (Document No. 18). On June 17, 2016, Plaintiff retained an attorney and filed an Amended Complaint as a matter of course pursuant to Fed. R. Civ.

[1] A magistrate judge "ha[s] the authority to decide [a] motion to amend [a complaint] outright." Maurice v. State Farm Mut. Auto. Ins. Co., 235 F.3d 7, 9 n.2 (1st Cir. 2000) (citing 28 U.S.C. § 636(b)(1)(A)). However, because I am recommending in part that the Motion be denied as futile, which applies a Fed. R. Civ. P. 12(b)(6) standard, I am issuing a Report and Recommendation.

P. 15(a). (Document No. 20). The Amended Complaint significantly streamlined the claims. As a result of the filing of the Amended Complaint, Defendants' pending Motion to Dismiss was denied as moot. (See Text Order dated June 27, 2016). Upon receipt of the Amended Complaint, Defendants filed another Motion to Dismiss on July 13, 2016. (Document No. 22).

Then, upon Plaintiff's request, his Attorney filed a Motion to Withdraw, which was granted. (Document Nos. 25, 26). Plaintiff thereafter entered his appearance pro se, and filed the present Motion to Amend, which includes a copy of the proposed Second Amended Complaint he seeks to file. He has never filed an Opposition to Defendants' Motion to Dismiss his First Amended Complaint. In his Motion, he cites to his initial Complaint and argues that he should be permitted to reinstate the "strong and legitimate" claims he stated in his original Complaint. Like his original Complaint, the proposed Second Amended Complaint, reverts in large part, to a rambling, narrative style. Defendants argue that the Court should deny Plaintiff's Motion to Amend because his proposed Second Amended Complaint is procedurally defective and futile. (Document No. 28).

Standard of Review

Fed. R. Civ. P. 15(a) provides that, within certain parameters, a party may amend its pleading once "as a matter of course." Because Plaintiff has already amended once, he must utilize Fed. R. Civ. P. 15(a)(2) which requires that he obtain "the opposing party's written consent or the court's leave" prior to filing an Amended Complaint. The Federal Rules instruct that the court should "freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962). The right to amend, however, is not absolute. "Among the adequate reasons for denying leave to amend are undue delay in filing the motion and undue prejudice to the opposing party by virtue of allowance of the amendment." Acosta-Mestre

v. Hilton Int'l of Puerto Rico, Inc., 156 F.3d 49, 51 (1st Cir. 1998) (internal quotations omitted). Additionally, as the Supreme Court recognized in Foman, there are many other reasons for denying a motion to amend, including: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." 371 U.S. at 182.

A motion to amend a complaint may be denied as futile if the "complaint, as amended, would fail to state a claim upon which relief could be granted." Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir. 1996). In determining whether a proposed amendment would be futile, a court applies the same standard as it would apply to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Id. The court must accept all the well-pleaded factual allegations as true and must draw all reasonable inferences favorable to the plaintiff but need not credit bald assertions or legal conclusions. Id. at 628. While a plaintiff need not plead factual allegations in great detail, the allegations must be sufficiently precise to raise a right to relief beyond mere speculation. See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (abrogating the "no set of facts" rule of Conley v. Gibson, 355 U.S. 41, 44-45 (1957)). The complaint "must allege 'a plausible entitlement to relief' in order to survive a motion to dismiss." Thomas v. Rhode Island, 542 F.3d 944, 948 (1st Cir. 2008) (quoting Twombly, 550 U.S. at 559).

Facts

The following alleged facts are gleaned from Plaintiff's proposed Second Amended Complaint. Defendants are correctional officers and prison administrators at the ACI, where Plaintiff is an inmate. Plaintiff alleges that he arrived at the ACI on November 5, 2013 and was

processed into the Intake Service Center ("ISC") in possession of legal documents, carbon paper and typing paper. (Document No. 27-1 at p. 3). While at the ISC from November 5, 2013 through February 18, 2014, he possessed and used the paper to create drawings. Id. His property was subject to searches throughout his time in the ISC, and his drawings and papers were not confiscated. Id. When he was transferred to "Max," his property was searched again, and he was allowed to possess the carbon papers and drawings. Id. Throughout 2014 and much of 2015, his personal belongings were routinely searched, and his drawings and carbon paper were handled by correctional officers who did not deem them to be contraband. Id. at p. 4. On June 16, 2015, Plaintiff made copies of his drawings and then mailed the originals to Linda Martin at Grelin Press. Id. Shortly thereafter, Plaintiff "began collecting newspaper articles and using then [sic] to produce drawings of incidents wherein young black men had been killed by White police officers under questionable circumstances." Id. The titles of some of these drawings were "body cam murder", "Classic 2015/Black Lives Matter," "Complexion Connection Alive and Kicking," "Fish in a Barrel," and "Stars and Bars and Straight Hate." Id. at pp. 4-5.

In August 2015, Plaintiff alleges that, while working on one of these drawings, a correctional officer asked him "'What are you trying to say?' in a threatening tone of voice that informed Plaintiff that [the Correctional Officer] was annoyed by the drawing." Id. at p. 5. Plaintiff offered to show the Correctional Officer the newspaper article which he claims was the basis for the drawing, but the Correctional Officer declined. In October 2015, Plaintiff alleges he was sent mail from Linda Martin at Grelin Press and that the mail was withheld by ACI Officials, without the notice required. Id.

On October 27, 2015, Plaintiff asserts that Defendant Pepin searched the cells in "A/2 cellblock, including Plaintiff's cell." Id. He asserts that Pepin confiscated roughly ninety drawings and a tablet of carbon paper, all of which he deemed to be contraband pursuant to DOC policy. Id. at p. 6. Plaintiff asserts that Pepin also "singled out one (1) sheet of paper and carefully propped it up, making a conspicuous display of it, on the pipes above the cell's sink." Id. Plaintiff asserts that the piece of paper contained a "Rhythmic Rhyme[ ]" which "discussed relations between Blacks and Whites." Id. Plaintiff asserts that Pepin denied him a confiscation slip and told him he would receive a misconduct report.

Pepin then discussed the drawings with Defendant Dove and John Doe, and John Doe determined that Plaintiff's presence in general population posed a threat to the security of the prison and transferred Plaintiff to the punitive segregation unit. Id. The following day, Lieutenant Amaral went to Plaintiff's cell to discuss the Misconduct Report which stated that the drawings confiscated depicted officers being assaulted. Id. at pp. 6-7. Plaintiff told Amaral that he purchased the carbon paper while in prison in Pennsylvania and possessed it during his tenure at the ACI. He also told Amaral that his drawings were depicting newspaper articles and not assaults on correctional officers. Id. at p. 7.

On October 29, 2015, Plaintiff appeared before Defendant Oden for his Misconduct Hearing. Oden conducted the Misconduct Hearing alone and determined that Plaintiff was guilty as charged and sentenced him to twenty days of disciplinary confinement. Id. Plaintiff filed an appeal to Warden Kettle on October 31, 2015, and Kettle found no "justification to alter the decision or sanction." Id. at p. 9. On November 10, 2015, Defendant Kettle returned Plaintiff's confiscated property, except the carbon paper and implicated drawing, which he told Plaintiff he needed to mail

out of the prison within thirty days or risk destruction. Id. Plaintiff remained in the segregation unit until November 17, 2015. While in segregation, Plaintiff received a letter from Ms. Martin at Grelin Press informing Plaintiff that her previous letters to him had been held by ACI officials and not delivered to him. Id. at p. 11.

When Plaintiff returned to the general population cellblock, Defendant Tyree delivered to Plaintiff some mail from Ms. Martin at Grelin Press. Id. at p. 11. On November 19, 2015, Plaintiff reported to a Correctional Officer that a manila envelope containing newspaper articles was not returned to him. He filed a request on the same day seeking the return of those articles. Id. When he didn't receive a response to his request, he filed a formal grievance, seeking return of the articles, or $1,000.00 and raising the issue of censorship. Id. at p. 13. His Grievance was denied by Defendant Kettle on December 9, 2015. He appealed the denial, and his Level 2 Grievance was denied on January 6, 2016.

In mid-January, Plaintiff's writings and drawings were formally published by Grelin Press and the book was titled, "A Cellfie or a Selfie." The book was "critical of conditions and officials at the ACI... [and] discuss[ed] racial injustice and abuses in Rhode Island's courts...." Id. The book was mailed to a variety of public officials including members of the Rhode Island judiciary and legislature and local media. Id.

On January 29, 2016, Plaintiff was moved "out of cell 7 in the P/2 cellblock and into cell 96 of the P/1 cellblock." Id. Plaintiff asserts that it is too loud and too cold in his cell. Id. at p. 14. He alleges that the cold causes his legs to ache, and he filed a Level 1 Grievance on February 7, 2016 concerning conditions in his cell. Id. at p. 15. On February 22, 2016 Plaintiff received a response to his Grievance which stated that "[t]he cell and surrounding cells were checked and there

did not appear to be any difference in the temperature." Id. Plaintiff filed his Level 2 Grievance on February 24, 2016. Plaintiff's Level 2 Grievance was also denied. Id. at pp. 15, 16.

Plaintiff asserts that he has been "passed over" "many times, in order to punish Plaintiff (with the harsh conditions of cell 96), while making decisions to transfer other prisoners...to cells...where conditions of confinement are much better...." Id. at p. 18. The claims set forth in his proposed Second Amended Complaint concern his claim that his twenty-day confinement in segregation coupled with the disciplinary charge concerning his drawings and writings violated his First and Fourteenth Amendment rights under the United States Constitution. He also alleges he lost access to preferred housing in retaliation for his exercise of his First Amendment rights. He also alleges that his Fourth Amendment rights were violated in the ACI Officials' refusal to return the newspaper articles to him. Finally, he alleges an Eighth Amendment violation relating to cold, loud conditions of his cell.

Analysis

I. Claims against Defendants Tyree and Cabral

Defendants assert that the proposed Second Amended Complaint fails to set forth any viable claims against Defendants Tyree and Cabral, because Plaintiff concedes that his claims against these Defendants are unexhausted. Defendants ask the Court to reject the Motion to Amend as futile as a matter of law as to these two Defendants.

The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title...by a prisoner...until such administrative remedies as are available are exhausted." "Section 1997e requires an inmate to exhaust all available administrative processes before filing a federal lawsuit

relating to the conditions of his or her confinement, even if some or all of the relief the inmate seeks is not available through the administrative process." Young v. Wall, C.A. No. 03-220S, 2006 WL 858085 at *2 (D.R.I. Feb. 27, 2006) (citing Booth v. Churner, 532 U.S. 731, 734 (2001)). "The PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002) "Non-exhaustion of administrative remedies is an affirmative defense, and the defendants bear the ultimate burden of pleading and proving non-exhaustion." Maraglia v. Maloney, C.A. No. 2001-12144-RBC, 2006 WL 3741927 at *1 (D. Mass. Dec. 18, 2006) (citing Casanova v. Dubois, 304 F.3d 75, 77 n.3 (1st Cir. 2002)).

In his proposed Second Amended Complaint, Plaintiff alleges that he has "exhausted all available, and required, administrative remedies **except for defendants Tyree and Cabral**." (Document No. 27-1 at p. 19). (emphasis added). Because Plaintiff concedes that he has not exhausted his claims against Defendants Tyree and Cabral, his proposed claims against them are futile. The Supreme Court has held that "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." Jones v. Bock, 549 U.S. 199, 218 (2007). Plaintiff has not complied with the requirement that he exhaust his remedies, and I, therefore, recommend that the Motion to Amend as to Defendants Tyree and Cabral be DENIED because Plaintiff's unexhausted claims are futile as a matter of law and would not withstand a motion to dismiss.

II. Claims against Defendants Dove and Travers

The claims asserted against Defendants Dove and Travers relate to Plaintiff's allegation that he was moved from "cell 7 in the P/2 cellblock and into cell 96 of the P/1 cellblock" as punishment for Plaintiff's exercise of his "Free Speech rights," and/or in retaliation for filing his grievance.

(Document No. 27-1 at pp. 13, 14, 20). Plaintiff also alleges that refusing to transfer him from cell 96 of the P/1 cellblock to another more desirable cellblock, constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.

As noted, in support of these claims, Plaintiff asserts that the cell is located in close proximity to the blowers from the ACI's HVAC system, which causes an uneven distribution of heat. He also asserts that his cell block consists of "mainly young, wild and irresponsible types of prisoners, who enjoy maintaining a chaotic environment...as opposed to the classification/placement of older, mature and responsible prisoners, who prefer the quiet, sedate atmosphere maintained [in the area he desired to be moved to.]" (Document No. 27-1 at p. 15). Finally, he notes that, in 2014, he requested to be "moved to 'better conditions of confinement'" and that the request was honored. Id.

Taking all of the allegations as true, they still fail to state any claim, and I am recommending that the District Court also deny the Motion to Amend as to these two Defendants because the proposed allegations are futile. In order to successfully assert a retaliation claim, Plaintiff would be required to prove that "(1) he engaged in constitutionally protected conduct, (2) he suffered an adverse action, and (3) there was a causal connection between the constitutionally protected conduct and the adverse action, so that it can be said that the constitutionally protected conduct was a motivating factor for the adverse action." Lyons v. Wall, 464 F. Supp. 2d 79, 83 (D.R.I. 2006). Plaintiff has failed to establish that he suffered an adverse action by being moved into a cell in a cellblock he deems less desirable. Plaintiff does not have a constitutional right to be placed in a particular cell. "There is no Constitutional right to be incarcerated in a particular facility, Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976), nor do prisoners enjoy a choice

of any particular cell. Lyon v. Farrier, 727 F.2d 766, 768 (8th Cir.1984) (citing Hewitt v. Helms, 459 U.S. 460, 466-467, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983))." Young v. Wall, No. C.A. 03-220S, 2003 WL 22849456, at *2 (D.R.I. Nov. 24, 2003). Because his allegations, taken as true, do not allege any adverse conduct, his retaliation claims related to his move into the P/1 cellblock fail.

Second, the allegations contained in the Second Amended Complaint do not give rise to an Eighth Amendment claim. A prison-conditions claim states a violation of the Eighth Amendment when two requirements are met: first, "the alleged deprivation of adequate conditions must be objectively serious, that is, the conditions of confinement must have deprived the plaintiff of 'the minimal civilized measure of life's necessities.'" Restucci v. Clarke, 669 F. Supp. 2d 150, 155-156 (D. Mass. 2009) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). Second, the "plaintiff must allege that the official involved acted with 'a sufficiently culpable state of mind,' namely, a 'deliberate indifference.'" Restucci, 669 F. Supp. 2d at 155-156 (citing Giroux v. Somerset Cty., 178 F.3d 28, 32 (1st Cir. 1999)).

In the present case, Plaintiff failed to meet his burden on the first part of this test because he has not alleged conditions that were "objectively serious" or that he was denied the "minimal civilized measure of life's necessities." Instead, as Plaintiff clearly alleges, he had a personal preference to be housed in another cellblock. Even though he has alleged loud, cold conditions, he has not alleged that the cell was "dangerously cold" as would be required to clear the first test. See, e.g., Skandha v. Savoie, 811 F. Supp. 2d 535, 540 (D. Mass. 2011) (low cell temperatures do not constitute an Eighth Amendment violation). He further notes that he grieved the cold conditions and the Grievance was denied because there was "no apparent difference in temperature" between his cell and "adjacent cells" on his cellblock. (Document No. 27-1 at p. 16). He presents no other

allegations concerning the temperature of his cell. Accordingly, he fails to state an Eighth Amendment claim as a matter of law, and I recommend that the District Court deny Plaintiff's Motion to Amend to include the claims against Defendants Dove and Travers.

III. Claims against Defendants Pepin, Oden and Kettle

Finally, the Defendants assert that the claims set forth in the Amended Complaint against Defendants Pepin, Oden and Kettle mirror those that were asserted in the initial Complaint and that they are stated in narrative form, and are redundant, confusing and conclusory. Defendants argue that the claims against these three Defendants fail to assert requisite allegations of adverse conduct and causation required to support a claim for deprivation of constitutional rights. (Document No. 28 at pp. 9-10). After reviewing the allegations, I am recommending the Motion to Amend be denied as to these three Defendants.

The claims against all three Defendants are repeated multiple times in the sections of the proposed Second Amended Complaint entitled "Claims for Relief" and ["Relief requested"] on pages 19-24 of the filing. Despite the repetition, the claims made against these Defendants are rambling and confusing, and fail to meet the minimal requirements set forth by the Federal Rules of Civil Procedure. Plaintiff appears to assert violations of the First, Fourth and Fourteenth Amendments concerning his period of segregation, his disciplinary filings, his disciplinary hearings, the searches and seizures of his personal property and his placement following his period of segregation. Nevertheless, it is impossible to effectively parse through his pleadings without referring back and forth through the various filings, and thus he fails to put Defendants reasonably on notice as to the substance and targets of his particular claims.

Under Rule 8(a), Fed. R. Civ. P., a complaint must contain three essential elements: (1) a short and plain statement of the legal basis for federal court jurisdiction; (2) a short and plain statement of the plaintiff's claim(s) showing that she properly states a claim for legal relief; and (3) a demand for judgment, i.e., the damages or other relief sought by the plaintiff. One of the primary purposes of Rule 8(a) is to give the defendant(s) and the Court fair notice of the claim being made by a plaintiff. Here, Plaintiff's proposed Second Amended Complaint clearly fails to comply with Rule 8(a). Moreover, Plaintiff's proposed Second Amended Complaint is in narrative form and does not clearly articulate the factual and legal bases for his claims as to each of the named Defendants. Although Plaintiff is proceeding pro se, he still bears the minimal burden of setting forth his claims in a manner that permits Defendants to understand and respond, without piecing together his present filing with the two versions of his Complaint he previously filed. Accordingly, I recommend the Motion to Amend be denied as to these three Defendants.

IV. Undue Prejudice

Defendants' final argument is that Plaintiff's proposed amendment constitutes an "abuse of process and a waste of judicial resources." (Document No. 28 at p. 1). I agree. Plaintiff initiated this action with a pro se 23- page, 164-paragraph Complaint on January 19, 2016. After reviewing the Complaint, Defendants moved to dismiss. (Document No. 18). Contemporaneously, Plaintiff engaged an experienced and competent attorney to represent him. (Document No. 16). Plaintiff's attorney reasonably moved for an extension of time to respond to the Motion to Dismiss. (Document No. 19). During a status conference with the Court, Plaintiff's counsel represented that she was reviewing Plaintiff's Complaint and may file an Amended Complaint "in lieu of a substantive objection" to Defendant's Motion. (Document No. 19). Plaintiff was granted an

extension of time and elected to file an Amended Complaint. The Amended Complaint is more concise and organized in a manner more consistent with the applicable pleading rules than Plaintiff's first attempt. In view of the Amended Complaint, Defendant's First Motion to Dismiss was denied as moot. Defendant also responded to the Amended Complaint with a Motion to Dismiss. (Document No. 22). Plaintiff subsequently released his attorney. (Document Nos. 24, 25 and 26). Rather than responding to the Second Motion to Dismiss, Plaintiff filed the instant Motion to Amend and wishes to revert to his initial pleading style.

Plaintiff has already had two bites at the apple in presenting his claims to the Court. He filed an initial pro se Complaint and then retained an attorney who made a reasonable decision to prepare and file an Amended Complaint on Plaintiff's behalf. He now seeks to reject the Amended Complaint prepared and filed by his former counsel and to file yet a third version which expands this case from two to eight Defendants and from 60 paragraphs to 154 paragraphs inclusive of requests for relief. Plaintiff's claims have been a moving target and have put Defendants to the burden of preparing and filing multiple substantive responses. Such burden and delay is prejudicial. In addition, Defendants recently filed a Supplemental Motion to Dismiss which asserts that this case should also be dismissed on res judicata grounds because the Rhode Island Superior Court has previously considered and rejected "substantially the same essential facts and claims Plaintiff raises in this action." (Document No. 35 at p. 1); see Jefferson v. Pepin, P.C. No. 2015-5003 (Providence County Superior Court). Plaintiff has not yet responded to the Supplemental Motion. However, it reasonably appears from Defendants' submissions that Plaintiff has forced them to defend and litigate the same essential claims in two different forums which also constitutes an abuse of process.

Conclusion

In summary, I recommend that the Court DENY Plaintiff's Motion to Amend (Document No. 27) and that the Court proceed with the First Amended Complaint (Document No. 20) as the operative document in this civil action. I also recommend that the Court ORDER Plaintiff to file any opposition to Defendants' pending Motions to Dismiss his First Amended Complaint (Document Nos. 22 and 35) within fourteen days.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
January 26, 2017